STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ERNESTO EVARISTO URIBE,

Defendant-Appellant.
_____/

Supreme Court No.
Court of Appeals No. 321012
Lower Court No. 13-020404-FC

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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Defendant-Appellant seeks leave to appeal the May 12, 2015 decision of the Michigan Court of Appeals, *People v. Uribe*, published opinion of the Court of Appeals, issued 05/12/15, #321012. This application is filed within 56 days of the Michigan Court of Appeals decision pursuant to MCR 7.302(C)(2).

Defendant-Appellant states the Michigan Court of Appeals decision in *Uribe*, supra, is clearly erroneous and the decision conflicts with a Supreme Court decision, namely, *People v Watkins*, 491 Mich 450 (2012).

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN DECIDING JUDGE CUNNINGHAM ABUSED HER DISCRETION BY RULING THAT "JU'S" DESCRIPTION OF THE OFFENSE DID NOT SATISFY THE "LISTED OFFENSE" REQUIREMENT OF MCL 768.27A?

The Court of Appeals made no answer.

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

II. DID THE COURT OF APPEALS ERR IN DECIDING JUDGE CUNNINGHAM ABUSED HER DISCRETION BY RULING THAT MRE 403 RULED OUT THE ADMISSION OF "JU'S" TESTIMONY OF PRIOR ACTS?

The Court of Appeals made no answer.

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

STATEMENT OF FACTS

Ernesto Uribe is charged with five counts of criminal sexual conduct in the 1st degree. The alleged victim is Uribe's ex-girlfriend's daughter who is a minor who will be referred to as "VG". Uribe and his ex-girlfriend have a minor child in common who will be referred to "JU".

The Trial Court denied admission of the evidence proffered by Plaintiff-Appellee on 3/24/14. The reasons for the entry of the order was based on what was placed on the record during the hearing on 321/14. Specifically, the Trial Court stated:

> First, I agree with Ms., with Ms. Van Langevelde that -- I mean the fact that the defendant was not charged with any crime against Jazmeen, that he was not arrested, that's not relevant or germane to what the court has to make a decision about.
>
> And I agree that 762.27a is meant to favor propensity. I, I believe that the purpose of the legislature was -- as Ms. Van Langevelde said, oftentimes children that are victims of sexual crimes are the only witness and it is -- while our natural tendency in, in the criminal justice system is to say you can't introduce one action to say somebody acted in conformity with it, this goes in the face of that, and deliberately. And it's because of the nature of who the victims and the difficulty of proving them. And I think Watkins does a really good job of laying all of that out.
>
> However having said that, Watkins does not stand for the proposition that because another child makes an allegation that the court has to let it in to show propensity. The court has to at least be the gatekeeper regarding the allegation and that, that there is a basis for the allegation. And I think Watkins speaks to that.

The court has many concerns about the allegations as it relates to Jazmeen. I, I, it's concerning that there was a initial statement, very clear nothing happened. And even reading the statements that were done more recently -- her statements I think are all over the place. I don't think it is at all clear about the touching as the prosecutor indicates. I think it's more clear that if anything happened she's been consistent that the hand was on the belly and that the fingers maybe dropped below the belly button.

And so to be very clear, I'm not sure that there is a basis to say that a tier three offense was committed. And in fact if that was the only basis to grant the motion I would be inclined to do that on that basis.

But even if I give the prosecutor the benefit of the doubt and say, okay, there is enough there for a tier three offense, the question still goes to whether or not the, the value to the prosecutor and the favorable weighing that I give to the victim in this case of showing propensity can still be outweighed by the, by prejudice by looking at the factors that Watkins goes through. And Mr. Pawluk went through those in his brief and, and the prosecutor responded to them.

Number one, the dissimilarity between the earlier acts charged is a, is a concern to the court. I don't believe to allow in a similar act under the statute that they have to be identical. And I want to be clear I'm not saying that they don't have to match up perfectly. But on the, this victim alleges that she was molested five times beginning when she was five years old and the last one being when she was nine years of age. And it's an, almost an identical pattern. It is anal penetration. There is nobody else in the home. And what Jazmeen is saying is that

whatever allegedly happened happened, not just when her father was allegedly in bed with her, but the girlfriend was in bed. And now to me that's a lot different than the victim who it appears most of the time was alone in the house and the defendant took advantage of it. Again, if the allegations are true.

The victim is very clear that there was no touching of the vaginal area. There was no touching of the breast area. There was no attempt to have her touch his penis. None of that. Each time it was anal penetration and that was it. What this victim is talking about -- again, it's not even clear to me the extent, if there was touching, after everything that I've read and considering the first interview. But it's not even close to being similar to what the victim will be testifying to.

The extreme differences between the two allegations and the fact that with the victim this occurred multiple times, with the proposed witness it only happened one time, causes a concern. Also the lack of reliable evidence supporting the fact that it occurred is a concern. Those concerns, in the court's opinion, tip the scale towards the defendant's issue of it being prejudicial because it is so dissimilar.

I think the purpose of this legislation honestly is to allow in other allegations that are more similar in nature to show a propensity; see, this is what the defendant does, this is what the defendant does.

These alleg, this one time alleged occurrence and the allegations don't do that. In fact they open up a whole 'nother thing that somehow he would be so brazen as to touch a child when another woman is in bed with him and other

> people are home and he tried to have her touch his penis and he tried to touch her vaginal area.
>
> That is so dissimilar from what we have here that I find it would be, I think it would be prejudicial to the defendant. I don't think it would help the jury in reaching a conclusion that he had the propensity because of the differences and for those reasons, as outlined in Watkins, I'm granting the defendant's motion to suppress. MT 18-22

Plaintiff-Appellee filed an emergency interlocutory appeal to the Michigan Court of Appeals on 3/25/14. Leave to appeal was granted on 7/16/14 (with the Honorable Stephen L. Borrello stating he would deny the application.)

The Court of Appeals stated the trial court made three errors when it assessed the admissibility of J.U.'s testimony under MCL 768.27a.: 1) the trial court had serious doubts about the witness' credibility; 2) the trial court wrongly expressed doubt that the offense J.U. intended to describe in her testimony constituted a "listed offense" under MCL 768.27a; and 3) the trial court committed another error of law when it assessed the admissibility of J.U.'s testimony under MRE 403.

The Michigan Court of Appeals reversed the Trial Court's Order to Suppress and remanded to the Trial Court for further proceedings without retaining jurisdiction. *People v. Uribe*, published opinion of the Court of Appeals, issued 05/12/15, #321012. Defendant-Appellant seeks leave to appeal the 5/12/15 of the Court of Appeals. This application is filed within 56 days of the Michigan Court of Appeals decision pursuant to MCR 7.302(C)(2). Defendant-Appellant objects to the consideration of any of Plaintiff-Appellee's attachments to

their answer to this application for leave that has not been already been admitted into evidence in the lower court and made part of the record.

ARGUMENTS

I. THE COURT OF APPEALS ERR IN DECIDING JUDGE CUNNINGHAM ABUSED HER DISCRETION BY RULING THAT "JU'S" DESCRIPTION OF THE OFFENSE DID NOT SATISFY THE "LISTED OFFENSE" REQUIREMENT OF MCL 768.27A.

Standard of Review:

Constitutional questions and issues of statutory interpretation are questions of law, which are reviewed de novo. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 480; 751 NW2d 408 (2008). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Discussion:

The Plaintiff-Appellee alleged that Defendant-Appellant had committed or attempted to commit a Tier III offense against JU, specifically a CSC second, MCL 750.520c. MT 15. To have committed CSC second, Plaintiff-Appellee must prove that (1) defendant intentionally touched the victim's genital area, groin, inner thigh, buttock, or breast; or made the victim touch his genital area; (2) this was done for a sexual purpose; and (3) the victim was under 13 years of age. CJI2d 20.2, and CJI2d 20.3.

JU first denied any kind of contact during the CPS interview on 11/2/12. When JU was forensically interviewed on 10/23/13, JU was asked about where she was touched when she was sleeping in the same bed with Mr. Uribe and his girlfriend. JU stated that Defendant-Appellant was not really that much in her underwear and that Mr. Uribe's palm was on her stomach and his

fingers in the top of her underwear. She further explained that she did not know if Mr. Uribe's penis was hard or soft. JU explained she woke up, and looked under the blankets and saw her Dad's privates. It was a single incident that happened in the summer of 2011. At no time did the Defendant-Appellant penetrate or touch JU's vaginal area or other genital parts, nor did JU touch her Mr. Uribe's penis. There was no indication the conduct alleged was for sexual purposes (JU did not know whether or not know whether or not Mr. Uribe's penis was hard or soft which also rules out her contact with Mr. Uribe's penis. JU's description of where Mr. Uribe's hand was rules out a touching of the vaginal area or groin. In addition, JU stated she thought Mr. Uribe was asleep, which if true, would nullify the intentional touching aspect as well.

Conclusion.

The Court of Appeals stated the trial court erred when the trial court wrongly expressed doubt that the offense J.U. intended to describe in her testimony constituted a "listed offense" under MCL 768.27a. However, based on the above analysis, all three elements of the offense of CSC Second, including attempt are not met and Judge Cunningham did not abuse her discretion in excluding this other acts evidence.

II. THE COURT OF APPEALS ERRED IN DECIDING JUDGE CUNNINGHAM ABUSED HER DISCRETION BY RULING THAT MRE 403 RULED OUT THE ADMISSION OF "JU'S" TESTIMONY OF PRIOR ACTS.

Standard of Review:

Constitutional questions and issues of statutory interpretation are questions of law, which is reviewed de novo. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007); *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). A trial court's decision to exclude evidence is

reviewed for an abuse of discretion. *People v Blackston*, 481 Mich 451, 480; 751 NW2d 408 (2008). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Discussion:

The Court held in *People v Watkins*, 491 Mich 450 (2012) that "evidence admissible pursuant to MCL 768.27a may nonetheless be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Watkins*, supra at 481.

Prejudicial evidence becomes unfairly prejudicial where "'a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect,' or 'it would be inequitable to allow the proponent of the evidence to use it.'" *People v McGuffey*, 251 Mich App 155, 163 (2002) (quoting *People v Mills*, 450 Mich 61, 75 (1995)). Prejudice is also unfair when it "inject[s] considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 337 (1994) (quoting *People v Goree*, 132 Mich App 693, 702-03 (1984)).

The unfairness that MRE 403 serves to protect against is the risk that the jury will convict a defendant because of his alleged prior misdeeds, rather than because he is actually guilty of the crime charged. *United States v Phillips*, 599 F2d 134, 136 (CA 6, 1979). MRE 403 prohibits other acts evidence that will lead the jury to shut its ears, to decide that it has heard enough, and to vote to convict, regardless of what the evidence shows, i.e., even if it does not show beyond a reasonable doubt that the defendant committed the offense actually charged in the complaint.

This list of considerations is meant to be illustrative rather than exhaustive. *People v Watkins*, 491 Mich at 487-88. The Court also instructed that courts must weigh the propensity inference in favor of the probative side of the equation. *Id*. at 487.

A. Trial Court Analysis. Regarding the first factor, the MCL 768.27a evidence Plaintiff-Appellee wants to admit is dissimilar to the conduct Defendant-Appellant is currently charged with. VG alleged she was anally penetrated by Mr. Uribe on five different occassions, with no other sexual contact. JU allegations are different, no penetration occurred, anally or otherwise, and the alleged contact happened once some time in 2011.

Regarding the second factor, there is disparity between JU and VG stated the alleged conduct occurred, it can be inferred that there may have been a lengthy span of time.

The third factor, JU alleged one single event whereas VG alleged five occurrences. The fourth factor, presence of intervening acts is met. Defendant-Appellant was asleep according to JU, which is an intervening act. The fifth factor is met as well. JU's allegations are unreliable, as JU denied any sexual contact between her and Mr. Uribe during the 11/2/12 interview, it took almost a year for JU to make the current allegations. The sixth factor is also met. Plaintiff-Appellee does not need to present evidence of JU's allegations as well. Plaintiff-Appellee has the VG's testimony, as well as family member's, counselors, and expert witnesses.

Another factor to consider is that VG was not related to Mr. Uribe in any manner. JU is the ***biological daughter*** of Mr. Uribe. The allegations that JU would testify to amounts to incestuous contact between a father and a daughter. That fact, in and of itself, has a high propensity to incense a jury despite any instructions given. Therefore, Judge Cunningham did not abuse her discretion in disallowing the proposed MCL 768.27a evidence due to the correct application of MRE 403 and the factors listed in *Watkins*, supra.

B. The Michigan Court of Appeals Analysis. The Court of Appeals stated the trial court made three errors when it assessed the admissibility of J.U.'s testimony under MCL 768.27a.: 1) the trial court had serious doubts about the witness' credibility; 2) the trial court wrongly expressed doubt that the offense J.U. intended to describe in her testimony constituted a "listed offense" under MCL 768.27a; and 3) the trial court committed another error of law when it assessed the admissibility of J.U.'s testimony under MRE 403.

Regarding the first issue, the Michigan Court of Appeals held that the Trial Court's analysis of the credibility of the witness was for a jury to determine, not the judge. *Uribe*, p 10. This finding is incorrect according to *Watkins*, which specifically states, "This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a *court* to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) *the lack of reliability of the evidence* supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive." *Watkins*, at 487-488 [emphasis added.] The Trial Court's finding JU's testimony not credible is simply the reason the Trial Court determined that JU's testimony lacked reliability as stated in factor 5 of *Watkins* above.

The second issue is discussed in Argument I, *supra.* As to the third issue, that the Trial Court committed another error of law when it assessed the admissibility of J.U.'s testimony under MRE 403 is incorrect and against the analysis in *Watkins*.

Watkins, directly addressed MRE 403 and its application in a case where MCL 768.27a comes into play. *Watkins* specifically stated that MRE 403 was never to be used in such an instance when it stated, "This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial." *Id.* at 487.

When applying MRE 403, *Watkins* held, "Regarding the decision whether to exclude evidence admissible under MCL 768.27a when applying MRE 403, it is argued that courts should not be permitted to consider how long ago the other act occurred, its dissimilarity to the charged offense, or the fact that the defendant was never convicted of the other act. We disagree."

The Court of Appeals opined the Trial Court was reverting to the "propensity" determination of MRE 403 that was thrown out by *Watkins* when the Trial Court addressed the dissimilarity between the acts involved. This is an incorrect reading of *Watkins*, supra, which specifically states, "The argument that the dissimilarity of the other-acts evidence and the charged offense should not be considered under MRE 403 similarly fails. Although MCL 768.27a, by its terms, applies to all listed offenses, there is no indication that the Legislature intended to suggest that all listed offenses are sufficiently similar to each other that the dissimilarity between them and the charged offense could never be weighed in favor of concluding that the other-acts evidence presents the danger of unfair prejudice under MRE 403." *Id*. at 488. The Trial Court was addressing this holding of *Watkins* by addressing the dissimilarity and nothing more.

Conclusion.

The Court of Appeals, in essence - if not in form - overrules *Watkins* in its entirety by their holding in *Uribe*. The Trial court was doing nothing more than making a decision

according to what was specifically instructed by *Watkins*. Propensity was addressed. MT 19. The remaining *Watkins* factors were addressed as well. The Michigan Court of Appeals decision must be reversed.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court to AFFIRM the lower court's ruling to exclude the MCL 768.27a evidence proffered by Plaintiff-Appellee and REVERSE the Michigan Court of Appeals.

Dated: July 2, 2015

Respectfully submitted,

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